IN THE

Supreme Court of the United States

October Term, 1977

No. 77-926

GERALDINE G. CANNON,

Petitioner,

v.

THE UNIVERSITY OF CHICAGO, ET AL.,

Respondents.

GERALDINE G. CANNON,

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v.

NORTHWESTERN UNIVERSITY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Reply Brief of Petitioner to Non-Federal Respondents

JOHN M. CANNON
Attorney for Petitioner

Suite 2245
20 North Wacker Drive
Chicago, Illinois 60606

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Reply Brief of Petitioner To Non-Federal Respondents

This reply is directed to the Joint Brief in Opposition filed on behalf of all respondents other than the federal respondents.

The federal respondents have informed petitioner that they propose to support petitioner in this Court as they did on rehearing in the Seventh Circuit. Accordingly, no reply to the federal respondents may be necessary.

QUESTION PRESENTED

Limitation of the question presented reflects the inconsistent rulings of the court below.

The university respondents first rephrased the question presented in the Petition to exclude denial of the alternative relief sought against the federal respondents, namely, the administrative enforcement which the court below held to be the exclusive remedy for violation of section 901 of Title IX, 20 U.S.C. § 1681. (Pet.Cert. p. 4). The schools' brief twice recognized that their opposition argument is dependent upon the validity of petitioner's alternate claim against the federal respondents. (Jt.Br.Op. pp. 8 n. 5, 12).

REPLY ARGUMENT

1. The "Introduction" distorts petitioner's qualifications and the record.

While, on the one hand, the schools say that the "issue here is not whether petitioner was academically qualified", (Jt.Br.Op. p. 4), their brief first points to certain of petitioner's academic qualifications, and suggests she was not admitted—or would not be admitted—to medical school on those grounds. The facts of record are contrary.[1]

First, the schools say that 2,000 applicants at The University of Chicago had better "academic qualifications." In fact, the published median college grade point average

[1] The factual record consists of the published data referred to in the verified complaints and an affidavit submitted in support of a motion for summary judgement by The University of Chicago which was not granted. No fact on which petitioner's claim was based is "directly contradicted" by that affidavit as implied by the schools' brief. (Jt. Br. Op. p.4).

("GPA") of the 1973 entering class at Chicago was 3.55.[2] Hers was 3.63.

Second, Chicago acknowledges that 12% of its entering class had average total Medical College Admission Test ("MCAT") scores below 575.[3] Hers was 585.

Third, Chicago's Dean of Students conceeded that his use of the term "academic qualifications" included the school's published statement that applicants "over 30 without advanced degrees . . . are not encouraged to apply."

Fourth, they point to Chicago's exculpatory data that 18.1% of the applicants and 18.3% of the entering classes were women. These would be meaningful numbers only in the circumstance—unlikely but certainly unproven—that the spectra of male and female qualifications were almost identical.[4]

Fifth, the schools say that petitioner's MCAT mathematical subtest score was in the lower 20% of the applicant group. Apart from being factually wrong (she was in the 69th MCAT percentile on math) not one word either in the record or elsewhere suggests that respondents have ever, before this lawsuit, considered math scores as having

[2] "Medical School Admission Requirements 1975-76", Association of American Medical Colleges.

[3] *Id.*

[4] To illustrate the fallacy of such numbers: if in fact the males were significantly 'better qualified' than the females, the 18.1—18.3 numbers would prove the existence of a quota; or if the females were significantly 'better qualified' than the males, the numbers would prove discrimination. The aggregate percentages for 1972-75 also conceal a decline in the acceptance percentage that was 3½ times as great for women as for men. Moreover, published admission policies which have a disproportionately adverse effect on women also must have a chilling effect on the number of women applicants.

any particularly significant bearing on medical school admissions.[5]

The thrust of petitioner's complaint was not only that she was denied a *fair* chance at admission—she was denied *any* chance. Chicago and Northwestern University have published their selection procedures. Chicago's is of record. All applicants are preliminarily screened on the basis of their intellectual qualifications. "The student's scholastic record, along with his Medical College Admission Test scores, are used in this procedure." The survivors (10% at Chicago, 15% at Northwestern) are then interviewed.[6] Petitioner's GPA and MCAT placed her comfortably within the group to be interviewed under this procedure. She was not.

The averrments of the complaint and the stubborn facts are that petitioner was screened out at the initial level on the basis of her age. Her combined GPA and MCAT science score would have given her an approximately 70% chance of admission to medical school on these two criteria alone.[7] And as the Petition has demonstrated, "age" is, in practical effect, a euphemism for gender. (Pet.Cert. pp. 6-8).

The schools argue that petitioner should be denied any opportunity to prove her claims because they may be contested and because her success on the jurisdictional issue may burden the courts with many other Title IX suits, some perhaps frivolous. (Jt.Br.Op. pp. 4-5). Merely to suggest such a result, as did the court below, is to confirm the conflict with *Conley* v. *Gibson*, 355 U.S. 41 (1957). Neither difficult nor frivolous litigation is peculiar to Title IX.

The schools also claim, as did the court below, that Title IX should not be enforced as Title VI was enforced in *Lau* v. *Nichols*, 414 U.S. 563 (1974). (Jt.Br.Op. p. 5). The primary

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[5] The math score is of course included in the average total MCAT score.

[6] *Op. Cit. supra* note 2.

[7] See the attached Table of Applicant—Acceptance Statistics. (App. p. A-1). Petitioner's MCAT science score was 585.

basis offered to reconcile such refusal to "stretch a statute by judicial interpretation" with the decision of this Court in *Lau* is an unprecedented jurisdictional preference for actions by "large groups".[8] The alternative basis, express authorization in 42 U.S.C. § 1983, is flatly inconsistent with their view of the statutory scheme under the four factor analysis of *Cort* v. *Ash*, 422 U.S. 66 (1974).

2. Argument under "The Statutory Scheme" and "Prior Decisions of this Court" overlooks Section 1983.

The schools claim that by providing administrative enforcement in the statutory scheme, Congress evidenced an intention to exclude judicial enforcement except by way of judicial review. Not a single congressman said so in the hearings, reports and debates on Title IX or Title VI. In fact, Congress declared that Title VI and Title IX "permit a judicial remedy through a private action." (Pet.Cert. pp. 8-9)

Mere provision for some administrative procedure to implement congressional policy generally has not been held to evidence an intention to preclude a judicial remedy. Indeed, administrative enforcement also is available in the situations where a judicial remedy has been most frequently implied. Note, "Implying Civil Remedies from Federal Regulatory Statutes," 77 *Harv. L. Rev.* 285 (1963). This Court required and relied upon considerably greater and uncontradicted evidence of congressional intent to reject private actions in *National Railroad Passenger Corp.* [*Amtrak*] v. *National Association of Railroad Passengers*, 414 U.S. 453 (1974), *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412 (1975) and *Cort*.

Most importantly, the schools' argument does not even attempt to account for the express authorization in 42 U.S.C.

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[8] See (Jt.Br.Op. pp. 5, 10 n. 8) 559 F.2d 1074 (Pet.Cert. App. pp. A-16 n. 16, A-17).

§ 1983 of a private right of action by an individual under Title VI and Title IX in the case of state action programs receiving federal financial assistance. The schools themselves elsewhere present exactly that argument in attempting to distinguish *Lau* and possibly *Regents of the University of California* v. *Bakke*, No. 76-811, should this Court decide it also under Title VI and the HEW regulations instead of the Constitution. (Jt.Br.Op. pp. 9, 11).

If a private right of action would conflict with the statutory scheme in the case of private programs receiving federal financial assistance, precisely the same considerations apply in the case of state programs. Congress applied the same policy and the same administrative procedures to all programs receiving federal financial assistance, state and private.[9]

By utilizing the state action distinction for *Lau*, the schools do not even purport to argue for an implicit exception of Title VI under section 1983, even to the extent that the statute and the regulations thereunder may go beyond the Constitution.[10] But without such an exception they cannot sustain their argument based upon the statutory scheme.

3. Commentary on "The Civil Rights Attorney's Fees Awards Act of 1976" avoids petitioner's argument.

The schools argue that the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988, established that the Act did not create any new

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[9] The schools' brief states that the finding they are not within the purview of section 1983 is not challenged in the Petition. (Jt.Br.Op. p. 9 n. 7). Such finding is challenged under *Conley* to the extent that the state action distinction is valid. (Pet.Cert. pp. 13-14). Petitioner contends it is not.

[10] See, *Washington* v. *Davis*, 426 U.S. 229 (1976), *Village of Arlington Heights* v. *Metropolitan District Housing Authority*, 429 U.S. 252 (1977) as well as *Lau* itself.

private right of action. Petitioner agrees. She never has claimed otherwise. Petitioner claimed that the specific inclusion of Title VI and Title IX in the Act confirmed the earlier congressional declaration that such laws already "permit a judicial remedy through a private action." (Pet.Cert. p. 8).

The bipartisan leadership reports had reflected both the express understanding that a private action already was permitted under Title VI and Title IX and the express disclaimer of intent to create any new right of action.[11] Both thoughts are fully compatible and simply do not conflict as the schools insist. To argue the contrary is to assert that the reports of the leadership were openly and expressly inconsistent. Logic certainly does not require any inconsistency as the schools suggest.

Senator Kennedy's report specifically declared that amendment of the bill to include Title IX would avoid cost limitation of private enforcement by reason of the state action circumstances involved in *Lau*.[12] Section 1983 already had been included in the original version of the bill. Subsequent addition of Title VI and Title IX would have been meaningless if Congress believed that private enforcement thereof either was not permitted or was limited to state action programs as the schools suggest.[13] As stated in *Brown* v. *General Services Administration*, 425 U.S. 820 (1976),

> "The relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was."

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[11] 122 Cong. Rec. (daily ed. Sept. 21, 1976) S.16251 report of Sen. H. Scott, S.16252 report of Sen. Kennedy, and (daily ed. Oct. 1, 1976) H.12150 *et. seq.* introduction by Reps. Anderson and Drinan and H.12159-60 report of Rep. Drinan.

[12] 122 Cong. Rec. (daily ed. Sept. 21, 1976) S.16252.

[13] Title IX was added through extraordinary procedures involving cloture of Senate fillibuster in the closing days of an election year Congress.

Mere awareness that the original decision in this case had raised a question as to the existence of private actions under Title VI and Title IX does not indicate that Congress agreed with the court below.[14] In fact, enactment of the law notwithstanding an awareness of such decision, indicates exactly the opposite. The terms of the Act itself, as well as the leadership reports and the remarks of virtually every congressman who spoke on the bill, confirm the congressional understanding that a private action already was permitted under both laws. (Pet.Cert. p. 8 n. 4).

4. The state action distinction of "Lau v. Nichols" and "The Bakke Case" conflicts with the analysis of the statutory scheme.

Much of petitioner's reply appropriate to the schools' argument distinguishing *Lau* and *Bakke* as state action cases already has been made above in replying to their opposite argument based on the statutory scheme.

The schools brief claims that jurisdiction in *Lau* was based on 42 U.S.C. § 1983. However, section 1983 is not a jurisdictional statute. *Blue* v. *Craig*, 505 F.2d 830 (4th Cir. 1974). The related jurisdictional statute is 28 U.S.C. § 1343(3). Jurisdiction is conferred on the federal courts just as clearly by 28 U.S.C. § 1343(4) in non-state action civil rights cases under Title VI or Title IX.

The schools' argument that this Court enforced Title VI and the HEW regulations in *Lau* on the basis of some form

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[14] The Senate apparently was unaware of the decision rendered only 25 days before it acted. Even in the House, Rep. Railsback, in referring to this case by name, indicated no awareness that the basis for the decision had been the asserted inconsistency of private actions with congressional intent. He conceded only that he was informed "there exists a serious question". 122 Cong. Rec. (daily ed. Oct. 1, 1976) H.12161. His remark would be a gross understatement by anyone familiar with the decision below.

of jurisdiction pendant to that established under section 1983 conflicts with their view of "The Statutory Scheme". There they assert Congress evidenced its intention that administrative action followed by judicial review should be the exclusive remedy.

If the schools' distinction of the decisions of this Court in *Lau* and possibly *Bakke* as state action cases under section 1983 is correct, a private action cannot be in conflict with the statutory scheme of Title VI or Title IX. The prior decisions of this Court then require the implication of a private right of action under the four factor analysis articulated in *Cort*.

Petitioner recognizes the anticipated significance of the *Bakke* decision noted by the schools. (Jt.Br.Op. p. 11). However, they themselves assert that this case presents the question of enforcement under Title VI and Title IX for non-state schools and programs which *Bakke* does not. Their suggestion of limited significance for this case (Jt.Br.Op. p. 12) conflicts directly with their concern over the broad jurisdictional issue presented. (Jt.Br.Op. p. 2).

5. Doctrines of primary jurisdiction and exhaustion do not apply to a remedy which is not available.

The record establishes beyond dispute that federal administrative enforcement, if exclusive, has been unreasonably delayed or withheld in violation of 5 U.S.C. § 706. Delay of over 2½ years without so much as preliminary findings is acknowledged by all parties. Such delay of an exclusive remedy for violation of national policy is unreasonable even without reference to *Conley*.

Accordingly, the decisions of this Court in *Allen* v. *Board of Education*, 393 U.S. 544 (1969) and *Rosado* v. *Wyman*, 397 U.S. 397 (1970) as well as the related decision of the Seventh Circuit in *Lloyd* v. *RTA*, 548 F.2d 1277 (7th Cir.

1977), require the judicial remedy sought by petitioner and supported by the federal respondents.[15] The doctrines of primary jurisdiction and exhaustion relied upon by the university respondents (Jr.Br.Op. pp. 7-9, 12) do not apply where meaningful administrative action may, but need not, be provided by the relevant agency or official. *Levers* v. *Anderson*, 326 U.S. 219 (1945). Delay of equitable relief until application has been made for the potential administrative relief is the limit of those doctrines in such circumstances. *U.S.* v. *Abilene & So. Ry. Co.*, 265 U.S. 274 (1924). *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973) is not to the contrary.

CONCLUSION

The importance and substantiality of the question presented in the Petition has not been denied by the university respondents. The only claim is that a judicial remedy may be premature. But review here cannot be premature where the alleged necessity of following further administrative proceedings plainly conflicts with the denial of such proceedings for almost three years. Such circumstance, in and of itself, raises a significant issue justifying the grant of certiorari.

In light of the schools' agreement with petitioner that she should have a judicial remedy for unreasonable delay against HEW and the agreement of HEW with petitioner that she should have a judicial remedy against the schools, the need for review of the action below is indisputable. Indeed, petitioner suggests that summary reversal is now in order. No party has urged that petitioner should continue without any remedy at this late date.

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[15] The schools' asserted distinction of *Lloyd* (Jt.Br.Op. p. 11 n. 9) overlooks that the time delay here involved is even greater and under an identical regulatory situation. (Pet. Cert. p. 12 n.7).

For the foregoing reasons, a writ of certiorari should issue to review the judgement and opinion of the Seventh Circuit.

Respectfully submitted,

JOHN M. CANNON
Attorney for Petitioner

Suite 2245
20 North Wacker Drive
Chicago, Illinois 60606

APPENDIX

Table of Applicant—Acceptance Statistics

Overall GPA (and Letter Grades)	MCAT Science Subtest Scores					
	Lower Scores			Higher Scores		
	200s	300s	400s	500s	600s	700s
Higher Grades	**Quadrant II**			**Quadrant I**		
3.8 - 4.0 (A)	0/1	4/15	55/101	442/566	833/1,047	278/282
3.4 - 3.7 (A- & B+)	1/5	32/110	317/791	1,964/3,162	2,429/3,167	432/496
3.0 - 3.3 (B)	1/17	57/338	338/1,931	1,550/4,948	1,602/3,332	196/307
Lower Grades	**Quadrant III**			**Quadrant IV**		
2.6 - 2.9 (B- & C+)	3/36	58/540	227/1,965	546/3,294	346/1,511	53/131
2.0 - 2.5 (C)	2/90	60/716	196/1,449	196/1,389	88/576	8/30
0.0 - 1.9 (below C)	1/16	10/112	11/115	6/64	4/18	0/0

Figure 1

Distribution of applicants and acceptees by undergraduate college grade-point average (GPA) and by scores on the Science subtest of the Medical College Admission Test (MCAT) for the 1973-74 entering class. Numerator in each cell is number of acceptees with indicated grades and MCAT scores; denominator is number of applicants with these characteristics.

Source: Association of American Medical Colleges. Petitioner's overall GPA was 3.63 and her MCAT science subtest score was 585.